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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-1242

RAYMOND NAKAI, CHAIRMAN OF THE NAVAJO TRIBAL COUNCIL OF THE NAVAJO INDIAN TRIBE, FOR AND ON BEHALF OF THE NAVAJO INDIAN TRIBE, INCLUDING ALL VILLAGES AND CLANS THEREOF, AND ON BEHALF OF ANY AND ALL NAVAJO INDIANS CLAIMING ANY INTEREST IN THE LANDS DESCRIBED IN THE EXECUTIVE ORDER DATED DECEMBER 16, 1882,

Petitioner,

v.

CLARENCE HAMILTON, CHAIRMAN OF THE HOPI TRIBAL COUNCIL OF THE HOPI INDIAN TRIBE, FOR AND ON BEHALF OF THE HOPI INDIAN TRIBE, INCLUDING ALL VILLAGES AND CLANS THEREOF, AND ON BEHALF OF ANY AND ALL HOPI INDIANS CLAIMING ANY INTEREST IN THE LANDS DESCRIBED IN THE EXECUTIVE ORDER DATED DECEMBER 16, 1882,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF OF HOPI TRIBE IN OPPOSITION

OPINIONS BELOW

The District Court of Arizona did not render a written opinion. The order of the District Court of Arizona appears in Appendix B of Petition. The opinion of the United States Court of Appeals for the Ninth Circuit appears in Appendix A of Petition and is reported at 453 F. 2d 152 (9th Cir. 1971).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Whether the district court under the Act of July 22, 1958,[1] and proceeding in accordance with the provisions of 28 U.S.C. § 2284,[2] has jurisdiction to enforce its own decree.

2. Whether a single judge can issue process to enforce the final judgment of a three-judge district court.

STATUTES INVOLVED

The Act of July 22, 1958, authorized suit in the United States District Court for the District of Arizona for the purpose of determining the rights and interests in certain lands and quieting title thereto in the Hopi and Navajo Tribes or Indians establishing such claims pursuant to the Executive Order of 1882 as may be just and fair in law and equity. The Act further provided in section 1:

> The action shall be heard and determined by a district court of three judges in accordance with the provisions of Title 28 United States Code, section 2284, and any party may appeal directly to the Supreme Court from the final determination by such three judge district court.

STATEMENT OF THE CASE

The judgment of the three-judge district court in *Healing v. Jones*,[3] rendered pursuant to the foregoing statutory authorization, among other things, provided:

---

[1] Act of July 22, 1958, Public Law 85-547, 72 Stat. 402; hereinafter referred to as "Act of July 22, 1958." The full text of this act appears in Appendix I, p. A-1, *infra*.

[2] The full text of this statute appears in Appendix II, p. A-3, *infra*.

[3] Healing v. Jones, 210 F.Supp. 125 (D. Ariz. 1962), *aff'd*, 373 U.S. 758 (1963); hereinafter cited as *Healing v. Jones*.

> The Hopi Indian Tribe and the Navajo Indian Tribe, for the common use and benefit of their respective members, but subject to the trust title of the United States, have joint, undivided and equal rights and interests both as to the surface and subsurface, including all resources, in and to all of the executive order reservation of December 16, 1882, lying outside of the boundaries of land management district 6, as defined on April 24, 1943, such boundaries being described in paragraph 1 of this judgment, and title in and to all of that reservation except the described district 6, is accordingly quieted in the Hopi Indian Tribe and the Navajo Indian Tribe, share and share alike, subject to the trust title of the United States, as a reservation.[4]

In the conclusion of its opinion the court stated:

> No longer will it be tenable for the Navajos to take the position that they have gained exclusive rights and interests in any part of the reservation. . . .
>
> It will now be for the two tribes and Government officials to determine whether, with these basic issues resolved, the area lying outside district 6 can and should be fairly administered as a joint reservation.[5]

Approximately seven years subsequent to judgment, the Hopi Tribe, acting through its tribal chairman, alleged in a petition (full text of Hopi petition appears in Appendix V hereof) to the District Court of Arizona that on or about August 6, 1963, the Hopi Tribe made a demand upon the Navajo Tribe and the United States for possession and use of one-half of the surface rights, including all resources in and to the joint use area, the title to which had been quieted

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[4] *Healing v. Jones,* Judgment (unreported), p. 228; the relevant portion of the judgment appears in Appendix III, p. A-5, *infra.*

[5] Appendix C, p. 121c of Petition.

in the Hopi Tribe and Navajo Tribe jointly, subject to the trust title of the United States. The petition further alleged that the Navajo Tribe had denied the right of the Hopi Tribe to the use or possession of the joint use property and that the United States, by and through its officers, the Department of Interior, the Bureau of Indian Affairs, employees and agents, for more than seven years from the decree of the Court in this case, and for more than six years since the demands of the Hopi Tribe for possession and for preservation of its interest in said joint use area, and for a period in excess of five years from the filing of applications with the Bureau of Indian Affairs by the Hopi Tribe, and individual members thereof, for allocations of grazing privileges upon said joint use area, had vacillated, equivocated, delayed, and denied the Hopi Tribe and its members the possession and use of the surface of the joint use area, or any part thereof.

Based upon its petition, the Hopi Tribe sought an order directing the Navajo Tribe and the United States to grant and permit the joint use and possession of the surface, including all resources in and to all of the joint use area, share and share alike, and to remove such Navajo livestock from said land as is necessary to accomplish such joint use without further waste or damage to the land. The Hopi Tribe further requested that the clerk of the court be directed to issue a writ of assistance to compel the performance of the judgment of the three-judge court entered on September 28, 1962, and to allow the Hopi Tribe to enter upon said joint use area with the Navajo Tribe, jointly and equally, to use and benefit from the grazing forage and all other surface resources of the area.

The district court assumed the facts as alleged in the Hopi petition, but denied relief upon the ground that the jurisdiction granted by the Act of July 22, 1958, gave the court authority to declare the nature of the interest of the parties and to do nothing further.

The decision of the district court denying the petition for a writ of assistance was appealed by the Hopi Tribe to the Ninth Circuit Court of Appeals. The Ninth Circuit reversed the district court and held that the district court has power to enforce its judgments absent some contrary provision in the jurisdictional statute. [Appendix A, p. 10a.] The Ninth Circuit also held that "the present proceeding is not an 'action or proceeding required by act of Congress to be heard and determined by a District Court of three judges.' " [Appendix A, p. 15a.]

The Navajo Tribe now petitions for a writ of certiorari to review the judgment and opinion of the Ninth Circuit. The Hopi Tribe opposes herewith that Petition.

ARGUMENT

The issues in the present case are indeed narrow and Petitioner's use of the words "partition," "divide," "declaratory quiet title," and "exclusive possession" can neither convert the original petition of the Hopi Tribe for compliance with the decree of the court into a partition action nor contuse the proceeding into attempted resolution of "delicate" and "unresolved" issues. The Court of Appeals in reply to the argument that the action is in essence an action for partition dispelled the fog in the following manner:

However, the short answer to the argument of the United States is that the relief sought is not a decree of partition; it is enforcement of the decree quieting title in co-tenants, which the court did have authority to enter.[8]

POINT I

THE DECISION BELOW IS NOT IN CONFLICT WITH THE ACT OF JULY 22, 1958, OR *HEALING V. JONES* AS AFFIRMED BY THIS COURT.

Petitioner's phrasal transposition, made out of context from *Healing v. Jones,* is not helpful in accurately determining whether the supplementary proceedings as authorized by the Court of Appeals, *Hamilton v. Nakai,* are compatible with the main decision. To eliminate the confusion injected into this proceeding by the Petitioner, therefore, the first three paragraphs of the opinion conclusion of the court in *Healing v. Jones* are set out in full below, underlining the portions that have been given proper attention by Petitioner:

> Under the judgment being entered herein about one quarter of the 1882 reservation, consisting of district 6 as defined in 1943, will be completely removed from controversy, having been awarded exclusively to the Hopi Indian Tribe. As to the remainder of the reservation, the facts and law, as herein determined and applied, and our lack of jurisdiction to partition jointly-held lands, preclude a complete resolution of the Hopi-Navajo controversy.
>
> But even as to this remaining part of the reservation in which the two tribes are herein held to have joint, undivided and equal rights and interests, the judgment will have the effect of narrowing the controversy. At least three crucial questions which have

[8] Appendix C, p. 13a of Petition.

heretofore hampered a fair administration of this part as a joint reservation, or a division thereof by agreement or Congressional enactment, have now been settled. No longer will it be tenable for the Hopis to take the position that no Navajos have been validly settled in the reservation. *No longer will it be tenable for the Navajos to take the position that they have gained exclusive rights and interests in any part of the reservation.* No longer will there be uncertainty as to the boundaries of the area of exclusive Hopi use and occupancy.

It will now be for the two tribes and Government officials to determine whether, with these basic issues resolved, the area lying outside district 6 can and should be fairly administered as a joint reservation. If this proves impracticable or undesirable, any future effort to partition the jointly-held area, by agreement, subsequently-authorized suit, or otherwise, will be aided by the determination in this action of the present legal rights and interests of the respective tribes.[7]

It will be observed from the Hopi petition for order and writ of assistance: (1) that no partition is requested (prayer of petition); (2) the supplemental proceeding is for assistance of the court in enforcing the judgment of the same court against the parties who are bound by the judgment (paragraph 1 of petition); (3) the Navajo Tribe has denied the right of the Hopi Tribe to the use or possession of any of the surface of the lands in question (paragraph 8 of petition), and continues to resist any effort on the part of the Hopi Tribe to gain possession or use of any portion of the surface of the joint use area, and continues to overgraze, damage and destroy the lawful interest of the Hopi awarded by the court (paragraph 11 of petition); (4) the United

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[7] Appendix C, pp. 121c-122c of Petition.

States continues to equivocate, vacillate and refuse to deliver to the Hopi Indians, or assist the Hopi Indians in obtaining, their one-half, undivided interest (paragraph 12 of petition).

The Navajos in practical effect have taken the untenable position that they have gained exclusive rights and interests in the joint use area. The Navajo Tribe and government officials refuse to determine whether, with the basic issues resolved, the area lying outside of district 6 can and should be fairly administered as a joint reservation. Thus, in this proceeding the real conflict with *Healing v. Jones* occurs not in the Ninth Circuit's opinion and not in the effort of the Hopi Tribe to enforce the terms of the original decree, but in the position assumed by the Navajo Tribe.

In this action, the Hopi Tribe seeks no "other disposition" of the joint-use interest lands than already determined and provided by the original decree. Petitioners herein conclude that enforcement of the decree is tantamount to a partition with the "ineluctable result" that some Navajos be ousted (Petition pp. 7-8). Such a conclusion is not justified where joint use is the remedy sought. Grazing on a permit basis restricting lawful users to the carrying capacity of the range, for example, is a long-established and generally-accepted practice. It would be a simple matter to direct that in the instant case half of the carrying capacity should be utilized by the Navajo Tribe, and half should be utilized by the Hopi Tribe. This would not, of course, constitute a partition.

The prayer of the petition filed by the Hopi Tribe requests that the Hopis be given the joint or common possession to which they are entitled, and that the Navajo live-

stock on said land be removed to the extent that it is necessary to accomplish the joint use without further damage to the lands. Removal of Navajo Indians is *not* requested despite the implications of Petitioner to the contrary.[8]

Upon examination it is evident that the cases relied upon by Petitioner to support his assertion that the Ninth Circuit's opinion is in conflict with *Healing v. Jones* do not sustain the Navajo position. Petitioner cites *Rambo v. United States,* 145 F.2d 670 (5th Cir. 1945), wherein an attempt was made to gain jurisdiction over the sovereign under a partition statute when in actuality the relief sought was quieting title. The Fifth Circuit held that federal courts have only such jurisdiction as the statute confers. The analogy urged by Petitioner between *Rambo* and the present case fails since the Hopi Tribe is not attempting to obtain greater jurisdiction than has already been granted. The court in *Healing v. Jones* was granted jurisdiction to quiet title and the Hopi Tribe only asks that the final judgment be enforced. Enforcement must be coextensive with jurisdiction, lest all decisions be rendered meaningless.

The case of *United States v. Kabinto,* No. 26,235 (9th Cir. Feb. 18, 1972), is cited by Petitioner as conflicting with

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[8] The Hopi Tribe does not contend that it does not believe a partition would be a more satisfactory solution, and it is hoped that Congress will, one day, authorize such a partition. However, this proceeding is necessary to prevent waste and to presently grant to each party justice. The accomplishment of this objective will aid materially should partition be later authorized by Congress. Congress has not yet, in fact, responded to consideration of partition as suggested by Petitioner. Congress merely has before it a bill H.R. 11128, 92nd Congress first session 1971 (Appendix D of Petition) which includes measures such as those suggested. The Hopi Tribe candidly informs the Court that it supports this legislation to effect partition. If the Navajo Tribe would be equally frank, it would admit that it opposes this legislative action with similar vigor as employed in preventing execution of the judgment herein. The Hopi Tribe first sponsored partition legislation in 1963 which was effectively blocked by the Navajo interests. See Appendix IV, p. A-7.

the present case inasmuch as it is a separate ejectment action against individual Navajos occupying land adjudged exclusively Hopi. That case will stand on its own merits. In the case at bar, the only remedy of the Hopi Tribe without special legislation is by way of writ of assistance or other ancillary process since the Navajo Tribe possesses sovereign immunity unless specifically waived by Congress. The defendants in the *Kabinto* case are individual Indians with no sovereign immunity, and proceedings may be had against them without congressional authorization.

The Act of July 22, 1958, specifically authorized the suit to determine the rights and interests of the parties *and* to quiet title thereto. It must be assumed that Congress was not simply intending to repeat itself, but was employing additional language for a specific purpose. The power of "determining the rights and interest" was given conjunctively with the power of "quieting title." Given the fact that the court had determined the rights and interests of the parties as authorized by the statute, it seems pertinent to inquire just what was added to its determination of the respective interests of the parties when it also quieted title. The meaning ascribed to the words "quieting title" should be the ordinary and natural sense of the words. *United States v. Copper Corp.*, 312 U.S. 600, 605 (1941). Quiet means to pacify, to render secure or unassilable by the removal of disquieting causes or disputes (Black's Law Dictionary, p. 1416). An action to quiet title is essentially a suit in equity (*Sharon v. Tucker*, 144 U.S. 533, 544 (1892); *Bowen v. Chase*, 94 U.S. 812 (1876)), wherein process subsequent to judgment is as essential to jurisdiction as process antecedent to judgment. If this were not true, the judicial power would be incomplete and entirely inadequate to the purpose for

which it was conferred by the Constitution. *Riggs v. Johnson County,* 73 U.S. 166 (1867). There is no conflict in the decision of the United States Court of Appeals for the Ninth Circuit in *Hamilton v. Nakai* and the Act of July 22, 1958.

POINT II

THERE IS NO CONFLICT OF DECISION.

While it is recognized that a writ of certiorari is sometimes granted by this Court to resolve conflicting decisions of two or more Circuit Courts of Appeal (see Supreme Court Rule 19; see also, *e.g., NLRB v. United Steelworkers of America and Nutone, Inc.,* 357 U.S. 357 (Frankfurter, J., 1958), the cases cited by Petitioner simply do not pose a conflict with the decision of the Ninth Circuit in this instance.

In *Stout v. Hendricks,* 235 F.Supp. 556 (S.D. Ind. 1964), the primary case cited by Petitioner, the constitutionality of the composition of the Indiana legislative districts was challenged. A three-judge district court granted preliminary injunctive relief. The plaintiffs in the case then sought to amend their complaint to seek additional relief and the defendants moved to dismiss. The single district court judge (to whom the case had originally been assigned prior to the composition of the three-judge panel) granted the motion to dismiss. At that time, however, there had been no final hearing on all of the relief sought. In fact, the three-judge court had expressly reserved judgment on other relief prayed for by plaintiffs and had ordered the case reopened for the purpose of receiving additional recommendations from the parties. Thus, the three-judge panel had specifically

reserved jurisdiction and several matters remained pending before the panel. The single judge's action was clearly erroneous in that it violated 28 U.S.C. § 2284 (5), which provides that a single judge shall not dismiss a three-judge court action.

The *Stout* decision is easily distinguished from the present situation inasmuch as the final judgment in *Healing v. Jones* quieting title had been entered. The function of the statutorily-created, three-judge court had been fulfilled. This was not true in *Stout*. Moreover, *Stout* does not serve as a basis for Petitioner to expand the jurisdiction of the three-judge court in *Healing v. Jones* by now claiming "delicacy" or "sensitive area of litigation." Those matters were considered and resolved first by a three-judge court and then affirmed by this Court in its *Healing v. Jones* decision. The present job for the district court in this case is merely ancillary: enforcement of the decree as affirmed by this Court. As the Ninth Circuit indicated in its decision below, a single district court judge is competent to accomplish this task.

Petitioner undermines his own argument that there is a decisional conflict by pointing out the "uniqueness of the {present} situation." (Petition, p. 12.) It is difficult to understand how the decision of the Ninth Circuit on the facts of this case can be in conflict with another court's holding when this case is "unique."

The case of *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), cited by Petitioner, also has no bearing on this case. In *Mendoza-Martinez* the plaintiff sought declaratory relief. This Court held that since no injunction against a state or federal regulatory scheme was sought, a three-judge court was not required.

In the present situation, Respondent's remedy does not flow from 28 U.S.C. §§ 2281 and 2282 upon which the *Mendoza-Martinez* case relies. The writ of assistance stems from the action brought pursuant to the Act of July 22, 1958, enacted for wholly different purposes than 28 U.S.C. §§ 2281 and 2282.

Petitioner also asserts that a three-judge court is required as a matter of principle because of the "complexity and importance" of the issues involved here. This assertion must be rejected because complexity and importance are not substitutes for congressional action, creating jurisdiction in a three-judge court. If this Court were to hold that every decree involving a complex and important case must be enforced only by three-judge courts at the district level, a needless burden (not to mention confusion) would be placed upon the federal judicial system of this Nation.

Indeed, Petitioner's real concerns and real objectives are evident on the face of his Petition. They are not associated with the "complexity" or "importance" of this litigation. Rather, they are aimed at the further delay and frustration of this Court's decree in *Healing v. Jones*.

Respondent submits that the Hopi Tribe has waited long enough for the decree of this Court to be enforced. Further delay is intolerable. The straw-man issue of "conflicting decisions" must be rejected.

POINT III

THIS PETITION PRESENTS NO IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT ALREADY BEEN DECIDED BY THIS COURT.

Supreme Court Rule 19 indicates that a writ of certiorari may be granted if a Court of Appeals has decided an im-

portant question of federal law which has not been, but should be, settled by this Court. In the present case, however, there is no such important federal question which has not already been decided by this Court.

The controlling case, cited by the Ninth Circuit, is *Public Serv. Comm'n of the State of Mo. v. Brashear Freight Lines, Inc.*, 312 U.S. 621 (1941). In that case this Court held that the reconvening of a three-judge district court to consider the question of damages resulting where a temporary injunction had issued, but was later dissolved, was improper because such determination was for the consideration of the district court in the exercise of its ordinary jurisdiction. The Court stated:

> We are of opinion that the *two judges called in under* §266 [28 U.S.C. §2281 et seq.] *to assist the district judge in passing upon the application for injunction should not have participated in consideration of the motion to assess damages. The limited statutory duties of the specially constituted three judge District Court had been fully performed before the motion for assessment of damages was filed.* For §266 of the Judicial Code provides for a hearing by three judges, instead of one District Judge, only in connection with adjudication of a very narrow type of controversy — applications for temporary and permanent injunctions restraining state officials from enforcing state laws or orders made pursuant thereto upon the ground that the state statutes are repugnant to the federal Constitution. The motion for damages raised questions not within the statutory purpose for which the two additional judges had been called. Those questions were therefore for the consideration of the District Court in the exercise of its ordinary jurisdiction, and the three judges requirement of §266 had no application. 312 U.S. at 625. [Emphasis added.]

Petitioner's attempt to distinguish *Brashear* "or any similar case" is inadequate. The mere fact that *Healing v. Jones* involved complex and important issues does not prevent a single district court judge from the exercise of his ordinary jurisdiction in the enforcement of the Court's decree. Moreover, nothing in *Brashear* indicated that the determination of damages in that case was a simple matter, contrary to Petitioner's implication. In addition, nothing in *Brashear* indicated that the remedy devised in that case would not have a "direct and immediate impact outside the courthouse" — again, contrary to Petitioner's implication.[9]

In short, as the Ninth Circuit noted [Appendix A, p. 14a of Petition]:

> The parallels between these cases and the present one are striking. In both, the parties involved before the three-judge court and the single district judge were the same. In both, the action before the respective courts was the same; the second proceeding was merely ancillary to the main action.

See also *Allen v. Prince Edward County*, 249 F.2d 462, 464 (4th Cir. 1957). In that case a three-judge court entered a decree requiring desegregation of certain public schools. The plaintiffs later moved for an order fixing a time limit for compliance with the decree. The Fourth Circuit held that the motion, which was in the nature of enforcement and ancillary to the main action, was properly heard by a single

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[9] Petitioners herein, with disregard for the inherent and adjudicated rights of the Hopi Indian and without apologies for the continual influx of Navajos who by sheer force exclude their co-owners from the joint use area, deplore the use of armed marshalls to enforce the decree of the court. Such declaration is something more than a veiled threat of involuntary compliance with the court's decision. It is a bold defiance to judicial process, clearly serving notice that the Navajos will not comply unless they are forced to abide by the laws of this Country. They remain insensitive to the wasteful consequences of overgrazing and are numb to the peril of self economic destruction so long as the Hopis are excluded in the process.

judge. Certainly the *Allen* case involved important and complex issues — and may even have required enforcement by armed force. Nevertheless, the matter was left to the judgment and imagination of the single district court judge. *Accord, Pabst v. Campbell,* 150 F.Supp. 71 (S.D. Ind. 1957); *Kenny v. United States,* 118 F.Supp. 907 (D.N.J. 1954). *Cf., Chandler v. Garrison,* 286 F.Supp. 18 (E. D. La. 1968); *Willis v. Pickrick Restaurant,* 234 F.Supp. 179 (N.D. Ga. 1964).

No important undecided federal question is presented here.

POINT IV

CONTRARY TO THE URGING OF PETITIONER, THE PURPOSE OF THIS PROCEEDING IS NOT TO REVIEW THE ORIGINAL DECISION OF *HEALING v. JONES.*

Petitioner attempts to forestall the enforcement of the mandate of this Court in *Healing v. Jones* not only by taking advantage of the delay time inherent in a petition such as this, but also by suggesting a review of the Court's original decision. Under the guise of discussing the "delicacy" of the remedy, Petitioner urges this Court to allow the three-judge court the opportunity to reverse this Court's prior decision. These alarming words are found at page 13 of the Petition:

> At the remedial stage in this case, for example, the important questions of federal Indian policy considered by the Court in *Healing v. Jones* must be *reconsidered and reweighed* in terms of the practical impact on those directly affected by the remedy. [Emphasis added.]

The case of *Healing v. Jones* is now *res adjudicata* and has been for over nine years. It is ludicrous, if not inconceivable, to presume that this Court would permit a district court to review and possibly reverse one of its decisions. It should be recalled that the Navajo Tribe took advantage of the statutory provision permitting direct appeal to this Court after the entry of judgment by the three-judge district court. The Navajo Tribe allowed this Court to "reconsider and reweigh" the lower court's decision during the process of that appeal. The Navajo Tribe's dissatisfaction with the *Healing* decision nine years after it has been affirmed by this Court is no basis for reconsideration. No procedural avenue or precedential authority exists which now grants the Navajo Tribe yet another review of the *Healing* decision.

CONCLUSION

From the foregoing reasons it is respectfully submitted that this Petition for a writ of certiorari should be denied.

Dated this 28th day of April, 1972.

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APPENDIX I

Public Law 85-547
85th Congress, S. 692
July 22, 1958

AN ACT

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That lands described in the Executive order dated December 16, 1882, are hereby declared to be held by the United States in trust for the Hopi Indians and such other Indians, if any, as heretofore have been settled thereon by the Secretary of the Interior pursuant to such Executive order. The Navaho Indian Tribe and the Hopi Indian Tribe, acting through the chairmen of their respective tribal councils for and on behalf of said tribes, including all villages and clans thereof, and on behalf of any Navaho or Hopi Indians claiming an interest in the area set aside by Executive order dated December 16, 1882, and the Attorney General on behalf of the United States, are each hereby authorized to commence or defend in the United States District Court for the District of Arizona an action against each other and any other tribe of Indians claiming any interest in or to the area described in such Executive order for the purpose of determining the rights and interests of said parties in and to said lands and quieting title thereto in the tribes or Indians establishing such claims pursuant to such Executive order as may be just and fair in law and equity. The action shall be heard and determined by a district court of three judges in accordance with the provisions of title 28, United States Code, section 2284, and any party may appeal directly to the Supreme Court from the final determination by such three judge district court.

SEC. 2. Lands, if any, in which the Navaho Indian Tribe or individual Navaho Indians are determined by the court to have the exclusive interest shall thereafter be a part of the Navaho Indian Reservation. Lands, if any, in which the Hopi Indian Tribe, including any Hopi village or clan thereof, or individual Hopi Indians are determined by the court to have exclusive interest shall thereafter be a reservation for the Hopi Tribe. The Navaho and Hopi Tribes, respectively, are authorized to sell, buy, or exchange any lands within their reservations, with the approval of the Secretary of the Interior, and any such lands acquired by either tribe through purchase or exchange shall become a part of the reservation of such tribe.

SEC. 3. Nothing in this Act shall be deemed to be a congressional determination of the merits of the conflicting tribal or individual Indian claims to the lands that are subject to adjudication pursuant to this Act, or to affect the liability of the United States, if any, under litigation now pending before the Indian Claims Commission.

Approved July 22, 1958.

APPENDIX II

28 U.S.C. § 2284

In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:

(1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding.

(2) If the action involves the enforcement, operation or execution of State statutes or State administrative orders, at least five days notice of the hearing shall be given to the governor and attorney general of the State.

If the action involves the enforcement, operation or execution of an Act of Congress or an order of any department or agency of the United States, at least five days' notice of the hearing shall be given to the Attorney General of the United States, to the United States attorney for the district, and to such other persons as may be defendants.

Such notice shall be given by registered mail or by certified mail by the clerk and shall be complete on the mailing thereof.

(3) In any such case in which an application for an interlocutory injunction is made, the district judge to whom the application is made may, at any time, grant a temporary restraining order to prevent irreparable damage. The order,

unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the full court. It shall contain a specific finding, based upon evidence submitted to such judge and identified by reference thereto, that specified irreparable damage will result if the order is not granted.

(4) In any such case the application shall be given precedence and assigned for a hearing at the earliest practicable day. Two judges must concur in granting the application.

(5) Any one of the three judges of the court may perform all functions, conduct all proceedings except the trial, and enter all orders required or permitted by the rules of civil procedure. A single judge shall not appoint a master or order a reference, or hear and determine any application for an interlocutory injunction or motion to vacate the same, or dismiss the action, or enter a summary or final judgment. The action of a single judge shall be reviewable by the full court at any time before final hearing.

A district court of three judges shall, before final hearing, stay any action pending therein to enjoin, suspend or restrain the enforcement or execution of a State statute or order thereunder, whenever it appears that a State court of competent jurisdiction has stayed proceedings under such statute or order pending the determination in such State court of an action to enforce the same. If the action in the State court is not prosecuted diligently and in good faith, the district court of three judges may vacate its stay after hearing upon ten days notice served upon the attorney general of the State. June 25, 1948, c. 646, 62 Stat. 968; June 11, 1960, Pub.L. 86—507, § 1(19), 74 Stat. 201.

APPENDIX III

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

Civil No. 579
Prescott

DEWEY HEALING, CHAIRMAN OF THE HOPI TRIBAL COUNCIL OF THE HOPI INDIAN TRIBE, FOR AND ON BEHALF OF THE HOPI INDIAN TRIBE, INCLUDING ALL VILLAGES AND CLANS THEREOF, AND ON BEHALF OF ANY AND ALL HOPI INDIANS CLAIMING ANY INTEREST IN THE LANDS DESCRIBED IN THE EXECUTIVE ORDER DATED DECEMBER 16, 1882,

Plaintiff,

vs.

PAUL JONES, CHAIRMAN OF THE NAVAJO TRIBAL COUNCIL OF THE NAVAJO INDIAN TRIBE FOR AND ON BEHALF OF THE NAVAJO INDIAN TRIBE, INCLUDING ALL VILLAGES AND CLANS THEREOF, AND ON BEHALF OF ANY AND ALL NAVAJO INDIANS CLAIMING ANY INTEREST IN THE LANDS DESCRIBED IN THE EXECUTIVE ORDER DATED DECEMBER 16, 1882; ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES, ON BEHALF OF THE UNITED STATES,

Defendants.

JUDGMENT

This cause having been submitted to the court on August 2, 1961, following trial, oral argument, and the filing of proposed findings of fact, objections thereto, and briefs, and the court having made and entered its findings of act and conclusions of law, now therefore it is hereby declared, adjudged and decreed that:

1. The Hopi Indian Tribe, for the common use and benefit of the Hopi Indians, but subject to the trust title of

the United States, has the exclusive right and interest, both as to the surface and subsurface, including all resources, in and to that part of the executive order reservation of December 16, 1882, lying within land management district 6, as defined on April 24, 1943, the said district 6 being described as follows: [Legal description omitted.] * * *

2. Title in and to the part of the 1882 reservation described in the preceding paragraph of this judgment is quieted in the Hopi Indian Tribe for the common use and benefit of the Hopi Indians, subject to the trust title of the United States, and such land is henceforth a reservation for the Hopi Indian Tribe.

3. The Hopi Indian Tribe and the Navajo Indian Tribe, for the common use and benefit of their respective members, but subject to the trust title of the United States, have joint, undivided and equal rights and interests both as to the surface and subsurface, including all resources, in and to all of the executive order reservation of December 16, 1882, lying outside of the boundaries of land management district 6, as defined on April 24, 1943, such boundaries being described in paragraph 1 of this judgment, and title in and to all of that reservation except the described district 6, is accordingly quieted in the Hopi Indian Tribe and the Navajo Indian Tribe, share and share alike, subject to the trust title of the United States, as a reservation.

4. No Indians or Indian tribes other than Hopis and Navajos have any right or interest in and to any part of the executive order reservation of December 16, 1882.

FREDERICK G. HAMLEY, Circuit Judge,
LEON R. YANKWICH, District Judge,
JAMES A. WALSH, District Judge.

September 28, 1962

APPENDIX IV

88th CONGRESS
1st Session

H. R. 9529

IN THE HOUSE OF REPRESENTATIVES

December 19, 1963

Mr. Aspinall (by request) introduced the following bill; which was referred to the Committee on Interior and Insular Affairs

A BILL

To authorize the partition of the surface rights of the Hopi and Navajo Indian Tribes in undivided trust lands, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled; That the Navajo Indian Tribe and the Hopi Indian Tribe, acting through the chairman of their respective tribal councils for and on behalf of said tribes, including all villages, clans, and individual members thereof are each hereby authorized to commence or defend in the United States District Court for the District of Arizona an action or actions against each other for the following purposes:

(1) For a partion in kind of the surface rights and interests, excluding coal, oil, gas, and all other minerals, in the lands to which title was quieted by the United States District Court for the District of Arizona, in the case of Dewey Healing and others against Paul Jones and others, No. Civil 579 Prescott (210 F. Supp. 125), in the Hopi Indian Tribe and the Navajo Indian

Tribe, share and share alike, subject to the trust title of the United States.

(2) For the purpose of determining the rights and interests of said parties in and to the lands permanently withdrawn from all forms of entry or disposal by the Act of June 14, 1934 (48 Stat. 960), for the benefit of the Navajo and such other Indians as may have already been located thereon, and for a partition of the surface rights and interests of said parties, excluding coal, oil, gas, and all other minerals, in said lands.

(3) For an accounting and adjudication of the claim of the Hopi Indian Tribe against the Navajo Indian Tribe for one-half of all sums collected by said Navajo Indian Tribe as trader license fees or commissions, lease proceeds or other similar charges for the doing of business or the use of lands within the Executive Order Reservation of 1882 and outside of Land Management District 6 thereof since the second day of June 1937, notwithstanding any statute of limitations to the contrary.

(4) For the determination and recovery of the fair value of the use by said Navajo Tribe since the 28th day of September 1962 of the undivided interest of the said Hopi Tribe in the land awarded to said tribes equally and undivided as aforesaid, notwithstanding the fact that said tribes are tenants in common of said lands.

(5) For the adjudication of any claims, that either said Hopi or Navajo Tribe may have against the other for damage to the lands to which title was quieted, as

aforesaid, by the United States District Court for the District of Arizona in said tribes, share and share alike, subject to the trust title of the United States, notwithstanding the fact that said tribes are tenants in common of said lands, and notwithstanding any statute of limitations to the contrary. Said claims shall however be limited to occurrences since the establishment of grazing districts on said lands in the year 1936 pursuant to section 6 of the Act of June 18, 1934 (48 Stat. 984).

SEC. 2. Such further original, ancillary, or supplementary actions between the parties hereto as may be necessary or desirable to insure the quiet and peaceful enjoyment of the reservation lands of said Hopi and Navajo Indians by said tribes and the members thereof and to fully accomplish all objects and purposes of this Act may be commenced in said United States District Court for the District of Arizona.

SEC. 3. The United States shall be joined as a party defendant to any action or actions commenced pursuant to this Act and shall be bound by the final judgment in such suits, but such action or actions shall not be regarded as a claim or claims against the United States.

SEC. 4. All land partitioned to the Navajo Indian Tribe or individual Navajo Indians and to the Hopi Indian Tribe, including any village or clan thereof, or individual Hopi Indians, pursuant to this Act shall be added to and become a part of the reservation of said tribes respectively, and shall be allocated adjacent to said respective reservations insofar as such allocations may seem practicable to the court under the evidence admitted in such action or actions.

SEC. 5. All applicable provisional and final remedies and special proceedings provided for by the Federal Rules of Civil Procedure and all other remedies and processes available for the enforcement and collection of judgments in the district courts of the United States may be used in the enforcement and collection of judgments obtained pursuant to the provisions of this Act.

SEC. 6. Nothing in the Act shall be deemed to affect the liability of the United States, if any, under litigation now pending before the Indian Claims Commission.

APPENDIX V

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. Civil 579 Prescott

DEWEY HEALING, CHAIRMAN OF THE HOPI TRIBAL COUNCIL OF THE HOPI INDIAN TRIBE, FOR AND ON BEHALF OF THE HOPI INDIAN TRIBE, INCLUDING ALL VILLAGES AND CLANS THEREOF, AND ON BEHALF OF ANY AND ALL HOPI INDIANS CLAIMING ANY INTEREST IN THE LANDS DESCRIBED IN THE EXECUTIVE ORDER DATED DECEMBER 16, 1882,

Plaintiff,

v.

PAUL JONES, CHAIRMAN OF THE NAVAJO TRIBAL COUNCIL OF THE NAVAJO INDIAN TRIBE FOR AND ON BEHALF OF THE NAVAJO INDIAN TRIBE, INCLUDING ALL VILLAGES AND CLANS THEREOF, AND ON BEHALF OF ANY AND ALL NAVAJO INDIANS CLAIMING ANY INTEREST IN THE LANDS DESCRIBED IN THE EXECUTIVE ORDER DATED DECEMBER 16, 1882; ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES, ON BEHALF OF THE UNITED STATES,

Defendants.

PETITION FOR ORDER AND WRIT OF ASSISTANCE

1. The above entitled court, comprised of three judges and convened in the manner authorized by Section 1 of the Act of July 22, 1958, 72 Stat. 402, and 22 U.S.C., Section 2284, rendered its final decision herein on the 28th day of September 1962, 210 F.Supp. 125, affirmed 373 U.S. 758, 83 S.Ct. 1559, 10 L.Ed. 2d 703. This supplemental proceeding petitions this court for its assistance in enforcing the

judgment of the above entitled court against the parties who are bound by the judgment herein.

2. By order of the United States Supreme Court, 373 U.S. 758, 10 L.Ed. 2d 703, 83 S.Ct. 1559, Raymond Nakai was substituted in the place of Paul Jones as the party appellant in No. 985 and as a party appellee in No. 1050 (defendant herein), and Abbott Sekaquaptewa was substituted in the place of Dewey Healing as a party appellee in No. 985 and as a party appellant in No. 1050 (plaintiff herein).

3. Clarence Hamilton is a successor to Dewey Healing and to Abbott Sekaquaptewa as the duly elected and authorized chairman of the Hopi Tribal Council of the Hopi Indian Tribe and appears herein for and on behalf of said tribe, including all villages and clans thereof and on behalf of any and all Hopi Indians claiming any interest in the lands involved in this action.

4. Raymond Nakai is the duly authorized successor to Paul Jones as chairman of the Navajo Tribal Council of the Navajo Indian Tribe, defendant in said action for and on behalf of said tribe and every member thereof, and for each and every Navajo Indian using and occupying, or who has or who has had any claim of any right, title or interest in the use and occupancy of, any part, parcel or portion of the lands involved in this action.

5. John N. Mitchell is a duly authorized successor to Robert F. Kennedy, Attorney General of the United States, a defendant herein.

6. This court by its decree of September 28, 1962 held, among other things, as follows:

"The Hopi Indian Tribe and the Navajo Indian Tribe, for the common use and benefit of their respective members, but subject to the trust title of the United States, have joint, undivided and equal rights and interests both as to the surface and subsurface, including all resources, in and to all of the executive order reservation of December 16, 1882, lying outside of the boundaries of land management district 6, as defined on April 24, 1943, such boundaries being described in paragraph 1 of this judgment, and title in and to all of that reservation except the described district 6, is accordingly quieted in the Hopi Indian Tribe and the Navajo Indian Tribe, share and share alike, subject to the trust title of the United States, as a reservation."

7. On or about August 6, 1963, the plaintiff made demand upon the defendants for possession and use of one-half of the surface rights, including all resources in and to all of the executive order reservation of December 16, 1882 lying outside of the boundaries of land management district 6 as defined on April 24, 1943, the title to which had been quieted in the Hopi Indian Tribe subject to the trust title of the United States, as a reservation.

8. The defendant, Chairman of the Navajo Tribe, has denied the right of the Hopi Tribe to use or possess any of the surface of said lands and has further denied the right of the Hopi Tribe to recover from said Navajo Tribe any compensation whatever for the use of the Hopi interest in said reservation, as defined by this court, by the defendant Navajo Tribe and its members.

9. The defendant, the United States, is the trustee and guardian of the property of the Navajo and Hopi Tribes, including the lands decreed by this court to be held in trust by the United States for the joint use and benefit of the Hopi

Indian Tribe and the Navajo Indian Tribe, share and share alike.

10. The defendant, the United States, by and through its officers, the Department of the Interior, the Bureau of Indian Affairs, employees and agents, for more than seven years from the decree of the court in this case, for more than six years since the demands of plaintiff, the Hopi Tribe, for possession and for preservation of its interest in said joint use area, for a period in excess of five years from the filing of applications with the Bureau of Indian Affairs by the Hopi Tribe, and individual members thereof, for allocations of grazing privileges upon said joint use area, has vacillated, equivocated, delayed and denied the Hopi Tribe and its members the possession and use of the surface of said joint use area, or any part thereof.

11. The defendant, the Navajo Tribe and individual members thereof, do now continue to resist every effort on the part of the Hopi Tribe to gain possession or use of any portion of the surface of said lands outside of said district 6 and continue to overgraze, damage and destroy the lawful interest of the Hopi Tribe awarded by this court.

12. The defendant, the United States of America, does still continue to equivocate, vacillate and refuse to deliver to the Hopi Indians, or assist the Hopi Tribe in obtaining, their one-half undivided interest in the surface of said joint use lands outside of said district 6 or the resources thereof, notwithstanding continual requests, supplications and demands of the plaintiff, the Hopi Tribe, for such use and possession.

WHEREFORE, your petitioner prays for an order of this court:

1. Substituting Clarence Hamilton in the place of Abbott Sekaquaqtewa as a party plaintiff herein.

2. Substituting John N. Mitchell in the place of Robert F. Kennedy as a party defendant herein.

3. Directing the defendants to forthwith grant and permit the joint use and possession of the surface, including all resources, in and to all of the executive order reservation of December 16, 1882, lying outside of the boundaries of land management district 6, as defined on April 24, 1943 to the Hopi Indian Tribe and the Navajo Indian Tribe, share and share alike, and to remove such Navajo livestock from said lands as is necessary to accomplish such joint use without further damage to said lands.

4. Directing the clerk of this court to issue a writ of assistance to compel performance of the judgment of this court entered herein on September 28, 1962 and to allow the plaintiff, the Hopi Indian Tribe, to enter upon said joint use area, and with the Navajo Tribe to jointly and equally use and benefit from the grazing forage and all other surface resources of said area, for the benefit of the respective members of said tribes until further order of this court.

DATED this 13th day of March 1970.

JOHN S. BOYDEN
STEPHEN G. BOYDEN
Attorneys for Plaintiff
Hopi Indian Tribe
315 East 2nd South, Suite 604
Salt Lake City, Utah 84111

RICHARD M. FENNEMORE
Of Counsel
900 First National Bank Building
411 North Central Avenue
Phoenix, Arizona 85004

EXHIBIT "A"

AFFIDAVIT

STATE OF UTAH)
ss.
COUNTY OF SALT LAKE)

John S. Boyden, being duly sworn, deposes and says that he is General Counsel for the plaintiff in the above entitled action; that on September 28, 1962, judgment was entered herein granting to plaintiff, the Hopi Indian Tribe, and to defendant, the Navajo Indian Tribe, the common use and benefit for their respective members, of the surface and subsurface, including all resources, in and to all of the executive order reservation of December 16, 1882, lying outside of the boundaries of land management district 6 as defined on April 24, 1943 and quieting title in said tribes, share and share alike, subject to the trust title of the United States, as a reservation; that the defendants herein have failed and refused and still fail and refuse to comply with said judgment in the manner more specifically set out in the petition, of which this affidavit constitutes a part..

s| JOHN S. BOYDEN

Subscribed and sworn to before me this 13th day of March 1970.

s| STEPHEN G. BOYDEN
Notary Public

My commission expires:
April 16, 1972

Residing at:
Salt Lake City, Utah